

ESTTA Tracking number: **ESTTA588673**

Filing date: **02/21/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91214448
Party	Defendant Michael F. Ball
Correspondence Address	Stephen G. Janoski ROYLANCE ABRAMS BERDO & GOODMAN LLP 1300 19TH STREET NW , SUITE 600 WASHINGTON, DC 20036 UNITED STATES sgjdocketing@roylance.com, sstraub@roylance.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Stephen A. Straub
Filer's e-mail	sgjdocketing@roylance.com, sstraub@roylance.com
Signature	/Stephen A. Straub/
Date	02/21/2014
Attachments	7 - Feb.21.2014 Ball's Motion to Dismiss.pdf(158552 bytes )

RED BULL GMBH	)	
	)	
	)	
	)	
v.	)	Opposition No. 91208003
	)	(Parent)
MICHAEL F. BALL,	)	Opposition No. 91214448
	)	
Applicant.	)	

Michael F. Ball (hereinafter, “Applicant”), hereby moves the Honorable Board per Fed. R. Civ. P. 12 to dismiss Opposition Proceeding No. 91214448 as a nullity based on Lanham Act Section 13(a) and Trademark Rules 2.104 and 2.105 due to the unsuccessful attempt by Red Bull, GmbH (hereinafter, “Red Bull”) to file a Notice of Opposition during the period in which U.S. Application No. 85400948 was published for opposition and due to the proceeding being instituted in error by the Board. Applicant requests the Board dismiss Opposition Proceeding No. 91214448 and advance the application to allowance.

The Federal Rules provide that a motion asserting a defense under Rule 12(b) must be made before pleading, if a responsive pleading is allowed. Accordingly, because of Rules 12(b)(6), 12(h)(3), and Lanham Act Section 13(a) Applicant moves the Board to dismiss this proceeding for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Applicant also argues the proceeding was instituted in error per Trademark Rules 2.104 and 2.105.

Consistent with TBMP § 503, the filing of this motion tolls the time for filing an answer. If the motion is denied, the Board must reset the time for filing an answer.

## **I. Facts in Support of Applicant's Motion**

Applicant's U.S. Application No. 85400948 was published for opposition on December 24, 2013 per Lanham Act Section 12, 15 USC § 1062.<sup>1</sup> On January 13, 2014, Red Bull initiated the ESTTA forms to identify the application to be opposed, identified the party opposing registration, and identified the U.S. registrations on which the opposition would be based. On submission of this preliminary information, the Board's ESSTA system instituted a proceeding and provided a discovery and trial schedule. The record does not show, however, that a complaint or Notice of Opposition was successfully delivered to the Board through ESTTA. The ESTTA-created electronic cover sheets were not attached to and do not form part of any complaint. Red Bull did not submit a paper copy of a complaint or Notice of Opposition in this proceeding. Because January 23, 2014 has passed, Red Bull did not file an opposition to Applicant's application on or before the expiration of the thirty-day publication period per 15 U.S.C. § 1063.

## **II. The Lanham Act Requires Timely Opposition for a Proceeding to be Instituted.**

"Any person who believes that he would be damaged by the registration of a mark upon the principal register ... may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor, within thirty days after the publication under subsection (a) of section 1062 of this title of the mark sought to be registered." 15 U.S.C. § 1063(a).

"The opposition must set forth a short and plain statement showing why the opposer believes he, she or it would be damaged by the registration of the opposed mark and state the grounds for opposition." 37 C.F.R. § 2.104. In this case, Red Bull merely identified the application to be opposed, identified itself as the would-be opposer, and identified its alleged registrations on which the opposition would be based. There was no successful submission to the Board of a document through ESTTA or via paper that can be identified as a complaint or Notice of

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<sup>1</sup> Red Bull did not extend the period of time in which to file a Notice of Opposition.

Opposition. *See* Exhibit 1. Without a complaint there is no statement showing why Red Bull would be damaged by the registration of Applicant's application and the grounds for opposition.

In *Vibe Records, Inc. v. Vibe Media Group, LLC*, 88 USPQ2d 1280 (TTAB 2008), the plaintiff tried to file a notice of opposition using the ESTTA system, but could not complete the electronic payment transaction before the expiration of the extended deadline to oppose. Plaintiff then filed the opposition by facsimile providing copies of the ESTTA pages showing the timely upload of the complaint but stopping short of final submission. *Id.* Even though the first attempt by plaintiff was timely, the Board held that oppositions may not be filed by facsimile. Therefore the proceeding was instituted in error and the case was dismissed on applicant's motion.

Similarly in *Melwani v. Allegiance Corp.*, 97 USPQ2d 1537 (TTAB 2010), the plaintiff timely filed a notice of opposition using ESTTA, but mistakenly believed that because he entered his registration data into the ESTTA form the registrations would become of record in the proceeding. Among other procedural errors by plaintiff, the Board held,

“The fact that completion of the ESTTA filing form results in the creation of electronic records in the Board's TTABVUE system, and that such records contain links to information on a pleaded registration, is for administrative ease and it is insufficient to make the pleaded registrations of record. In view thereof, opposer's pleaded registrations are not of record and cannot be relied upon by opposer in support of his claims, or to establish that dismissal under Trademark Rule 2.132 is not warranted.”

*Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1540 (TTAB 2010). The Board further reasoned that it is plaintiff's responsibility to submit the necessary documents in support of an opposition and ensure that the documents are in fact delivered to the Board. Here the same is true of Red Bull's complaint as it was for the pleaded registrations in *Melwani*. Very simply, there is no evidence that the documents were successfully and timely submitted to the Board to become of record. While Red Bull may have had good and timely intentions, the Notice of Opposition was not delivered to the Board before the expiration of the time to oppose, similar to plaintiff in *Vibe Records*. These cases show that incomplete ESSTA filings are the responsibility of the party making the submission. The

documents must be properly and timely uploaded to be entered into the record and recognized by the Board.

“If opposer intended to rely on printouts from the USPTO’s electronic databases to introduce his pleaded registrations, opposer was required to electronically attach copies of such printouts as exhibits to its on-line submission of its notice of opposition, which attachments would then form part of the record.” *Melwani*, 97 USPQ2d at 1540. Here Red Bull intended to rely on a complaint and was required to timely submit such complaint to the Board to form part of the record. Because the facts show no complaint was submitted, the proceeding should not have been instituted.

### **III. The Opposition Proceeding Was Wrongly Instituted.**

Without a complaint there is no claim by Red Bull on which relief can be granted. And without a complaint, the proceeding was instituted in error. The Trademark Rules provide:

“When an opposition in proper form (*see* §§ 2.101 and 2.104), with proof of service in accordance with § 2.101(b), has been filed and the correct fee has been submitted, the Trademark Trial and Appeal Board shall prepare a notification, which shall identify the title and number of the proceeding and the application involved and shall designate a time, not less than thirty days from the mailing date of the notification, within which an answer must be filed. If a party has provided the Office with an e-mail address, the notification may be transmitted via e-mail.” Trademark Rule 2.105(a); 37 C.F.R. § 2.105(a).

“The Board shall forward a copy of the notification to applicant, as follows: (1) If the opposed application contains a clear indication that the application is being prosecuted by an attorney, as defined in § 11.1 of this chapter, the Board shall send the documents described in this section to applicant’s attorney.” Trademark Rule 2.105(c); 37 C.F.R. § 2.105(c).

The facts here show that there was not an opposition in proper form timely delivered to the Board. Thus there was not and could not have been a properly instituted proceeding between Red Bull and Applicant. Further, there was not and could not have been a proper notification by the Board to Applicant. *See* Exhibit 2. Therefore, the Board could not have jurisdiction over the subject matter of Applicant’s application for registration. Accordingly Applicant moves that this proceeding must be dismissed as a nullity.

Red Bull cannot now, by filing an amended notice of opposition, cure the failure to timely file an original notice of opposition. “A notice of opposition can be amended as of right only if the original notice of opposition was proper.” *Schott AG v. Scott*, 88 USPQ2d 1862, 1864 (TTAB 2008). In *Schott AG*, the notice of opposition filed by the would-be plaintiff lacked proof of service. Thus there was no operative notice of opposition to amend, and “an amended notice of opposition cannot be used as a substitute for the original notice of opposition because ... the original notice of opposition was not filed within the opposition period.” *Id.*

Red Bull’s recourse must lie in the filing of a petition for cancellation per Lanham Act Section 14 if and when a registration issues. *Yahoo! Inc. v. Loufrani*, 70 USPQ2d 1735, 1736 (TTAB 2004).

#### **IV. The Opposition Proceeding Must Be Dismissed.**

Based on the facts applied to the law cited herein, Applicant requests that the proceeding be dismissed as a nullity and the application advance to allowance.

Respectfully submitted,  
MICHAEL F. BALL



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Stephen G. Janoski  
Stephen A. Straub  
Counsel for Applicant  
Roylance, Abrams, Berdo & Goodman, L.L.P.  
1300 19th Street, N.W. Suite 600  
Washington, DC 20036-1649  
Office: (202) 659-9076  
Fax: (202) 659-9344  
sgidocketing@roylance.com

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO DISMISS OPPOSITION No. 91214448 PER FED. R. CIV. P. 12 was deposited with the U.S. Postal Service, postage prepaid for delivery by First-Class Mail on counsel for Red Bull this 21st day of February 2014 as follows:

Martin R. Greenstein  
TechMark a Law Corporation  
4820 Harwood Road, 2nd Floor  
San Jose, CA 95124-5273



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Stephen A. Straub

### **CERTIFICATE OF FILING**

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO DISMISS OPPOSITION No. 91214448 PER FED. R. CIV. P. 12 was filed with the U.S. Patent and Trademark Office using the ESTTA filing system on this 21st day of February 2014.



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Stephen A. Straub

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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RED BULL GMBH

v.

MICHAEL F. BALL,

Applicant.

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Opposition No. 91208003  
(Parent)  
Opposition No. 91214448

**EXHIBIT 1**  
to  
**APPLICANT’S MOTION TO DISMISS OPPOSITION No. 91214448**  
**PER FED. R. CIV. P. 12**



ESTTA Tracking number: **ESTTA581603**

Filing date: **01/13/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Red Bull GmbH		
Entity	Limited Liability Company	Citizenship	Austria
Address	Am Brunnen 1 Fuschl am See, A-5330 AUSTRIA		

Attorney information	Martin R. Greenstein TechMark a Law Corporation 4820 Harwood Road, 2nd Floor San Jose, CA 95124 UNITED STATES MRG@TechMark.com, LZH@TechMark.com, AMR@TechMark.com Phone:4082664700
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### Applicant Information

Application No	85400948	Publication date	12/24/2013
Opposition Filing Date	01/13/2014	Opposition Period Ends	01/23/2014
Applicant	Michael F. Ball 145 Channel Pointe Mall Marina Del Rey, CA 90292 USX		

### Goods/Services Affected by Opposition

Class 032. First Use: 0 First Use In Commerce: 0  
All goods and services in the class are opposed, namely: Non-alcoholic beverages, namely, carbonated beverages

### Grounds for Opposition


Priority and likelihood of confusion	Trademark Act section 2(d)
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### Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	3939863	Application Date	12/05/2002
Registration Date	04/05/2011	Foreign Priority Date	11/04/2002
Word Mark	RED		
Design Mark			
Description of Mark	NONE		

Goods/Services	Class 032. First use: First Use: 0 First Use In Commerce: 0 energy drinks and soft drinks		
U.S. Registration No.	2494093	Application Date	02/28/1995
Registration Date	10/02/2001	Foreign Priority Date	09/01/1994
Word Mark	RED BULL		
Design Mark			
Description of Mark	NONE		
Goods/Services	<p>Class 003. First use: First Use: 0 First Use In Commerce: 0 [ body soaps; perfumes; cosmetics, namely, lipstick, lip gloss, and eyeliner ]</p> <p>Class 005. First use: First Use: 0 First Use In Commerce: 0 [ pharmaceutical products for the purposes of strengthening and body restoration, specifically, vitamin and mineral supplements; nutritional supplement tonics; nutritionally fortified beverages for use as supplements ]</p> <p>Class 012. First use: First Use: 0 First Use In Commerce: 0 [land] [and air ] ((vehicles, namely, bicycles;))[ parts and accessories for bicycles, namely, luggage carriers, bells and air pumps]</p> <p>Class 014. First use: First Use: 0 First Use In Commerce: 0 ((goods of precious metals their alloys and goods coated therewith, namely, pendants [and medals], ornamental pins and giftware, namely, jewelry charms;)) [chains,] [tie clips, cuff links, flasks] [jewelry, including costume jewelry;] [cuff links] [and tie pins;] horological instruments, namely, clocks, watches [, stopwatches, timing devices and chronometers]</p> <p>Class 016. First use: First Use: 0 First Use In Commerce: 0 [paper goods, namely, table napkins;] printed matter, namely, magazines, newsletters and publications featuring information and articles on sports, health, [ nutrition and diet] and general topic information; [mounted photographs;] instructional and teaching material in the fields of sports, health, [nutrition, diet] and general lifestyle activities</p> <p>Class 018. First use: First Use: 0 First Use In Commerce: 0 ((goods and small articles made of leather and of imitation leather, namely, [knapsacks,] purses, pocket wallets;)) [ key cases] [ trunks and] traveling bags; [garment bags for travel;] umbrellas</p> <p>Class 020. First use: First Use: 0 First Use In Commerce: 0 [furniture mirrors,] picture frames;[ goods made of plastic, namely, money clips;] goods made of plastics, namely, key chain tags</p> <p>Class 025. First use: First Use: 0 First Use In Commerce: 0 footwear, clothing, namely, shirts, pants, T-shirts, sweat shirts and sweat pants, shorts, blouses, [skirts,] jumpers, [socks,] hats, caps; outerwear, namely, jackets; [and coats] activewear, namely, shorts, shirts, hats, caps and visors; [bandannas, neckerchiefs, coats,] jackets, sweaters, [sleepwear; resort wear, namely, shorts, shirts, T-shirts and pants; suspenders]</p> <p>Class 026. First use: First Use: 0 First Use In Commerce: 0 ((belt clasps))</p> <p>Class 028. First use: First Use: 0 First Use In Commerce: 0 [ games and playthings, namely, toy action figures; basketball equipment, namely, basketballs and backboards; skis, skipoles, bags for skis, ski parts, and snowboards; non-motorized golf carts, ] balls and bags; balls for soccer [, football, volleyball] [and baseball; hockey sticks and pucks; roller-skates;</p>		

	<p>ornamentsfor Christmas trees ]</p> <p>Class 030. First use: First Use: 0 First Use In Commerce: 0</p> <p>[ flavored ices; milkshakes, frozen yoghurt and ice cream ]</p> <p>Class 032. First use: First Use: 0 First Use In Commerce: 0</p> <p>[mineral waters and aerated waters and other non-alcoholic beverages, namely, flavored waters; ] soft drinks; and sports drinks</p> <p>Class 034. First use: First Use: 0 First Use In Commerce: 0</p> <p>[ tobacco;] ((smokers' articles, namely,))[ tobacco tins, cigar and cigarette holders,] ((matches,)) [cigar and cigarette cases,] ((ashtrays,)) [all not of precious metal; pipe stands; smoking pipe cleaners; cigar cutters; smoking pipes;] ((cigarette lighters)) [ not of preciousmetal; pocket machines for rolling cigarettes; cigarette paper and filters; andmatches ]</p> <p>Class 035. First use: First Use: 0 First Use In Commerce: 0</p> <p>promoting goods and services in the beverage, sports, auto racing, motorcycle racing, bicycle racing, boat racing[ food,][ fragrance, toiletries, tobacco,] [and ] [automobile] industries through the distribution of printed, audio and visual promotional materials(; and promotingsports events and competitions for others))</p> <p>Class 039. First use: First Use: 0 First Use In Commerce: 0</p> <p>[ travel agency services, namely, making reservations and bookings for transportation; tour guide services; airplane rental ]</p> <p>Class 041. First use: First Use: 0 First Use In Commerce: 0</p> <p>teaching and education services, namely, conducting seminars in the fields of sports and general lifestyle activities; entertainment in the nature of live music performances, ongoing and special event television shows featuring sports competitions, racing competition for autos, motorcycles, bicycles, boats, musical and/or dance performances; sports competitions, namely, [ baseball and ] football games; and organizing exhibits for cultural purposes</p> <p>Class 042. First use: First Use: 0 First Use In Commerce: 0</p> <p>[ hotel services and boarding house services ]</p>
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U.S. Registration No.	3092197	Application Date	12/31/2003
Registration Date	05/16/2006	Foreign Priority Date	NONE
Word Mark	RED BULL		
Design Mark			
Description of Mark	NONE		
Goods/Services	<p>Class 032. First use: First Use: 1987/01/31 First Use In Commerce: 1996/05/31</p> <p>Non-alcoholic beverages, namely energy drinks and hypertonic drinks</p> <p>Class 033. First use: First Use: 2002/07/23 First Use In Commerce: 2002/08/15</p>		

	[ Alcoholic beverages, namely, vodka ]		
U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	RED, RED BULL, and other marks for or incorporating the words RED and RED BULL		
Goods/Services	Beverages, energy drinks, sports drinks, soft drinks, carbonated beverages, and various other products and services related or complementary thereto		
Related Proceedings	91208003		
Attachments	78347152#TMSN.jpeg( bytes ) Michael Ball-+RED POWER ELIXIR-85400948-Notice of Opp.pdf(124499 bytes )		

### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Leah Z. Halpert/
Name	Leah Z. Halpert
Date	01/13/2014

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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RED BULL GMBH

v.

MICHAEL F. BALL,

Applicant.

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Opposition No. 91208003  
(Parent)  
Opposition No. 91214448

**EXHIBIT 2  
to  
APPLICANT’S MOTION TO DISMISS OPPOSITION No. 91214448  
PER FED. R. CIV. P. 12**

**From:** [ESTTA@USPTO.GOV](mailto:ESTTA@USPTO.GOV)  
**To:** [CWCdocketing](#)  
**Subject:** Notice of Opposition - 91214448  
**Date:** Monday, January 13, 2014 7:49:40 PM

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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

Opposition No. 91214448  
Application No. 85400948

01/13/2014

IMPORTANT NOTICE

A notice of opposition to registration has been filed with respect to the application listed above.

The Trademark Trial and Appeal Board (TTAB) has issued an order instituting the opposition proceeding and setting trial dates. To see the order, click on the link below or paste the URL into the address box of your browser.

<http://ttabvue.uspto.gov/ttabvue/v?pno=91214448&pty=OPP&eno=2>

This order contains important information which you should review immediately. You must respond to the notice of opposition within forty days of this date. This will be the only notification of this order you will receive.

An e-mail copy of the order itself will not be sent.

If you are unable to view the order, call the TTAB for technical assistance at 571-272-8500. Do not use the reply button to respond to this message by e-mail.

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The entire public file of this proceeding may be viewed at <http://ttabvue.uspto.gov>.

Papers in Board proceedings may be filed electronically with ESTTA at <http://estta.uspto.gov>.

Further information is available at the TTAB's web page at <http://www.uspto.gov>.